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IN THE

SUPREME COURT OF THE UNITED STATES

No. 393

GABRIEL GOMEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

LOUIS A. SABATINO
Attorney for Petitioner
923 duPont Building
Miami 32, Florida

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No. ———

GABRIEL GOMEZ,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

REVIEW SOUGHT

Gabriel Gomez, the petitioner, submits this, his petition for writ of certiorari to the Honorable Supreme Court of the United States and prays that the judgment of conviction, and sentence entered on a jury verdict against him, which was affirmed on appeal by the United States Court of Appeals for the Fifth Circuit, on June 24, 1957, Case No. 16,063, be reviewed and that the writ herein prayed for be granted.

JURISDICTION

It is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit, rendered June 24, 1957, Case No. 16,063, should be reviewed by this Honorable Court in that said judgment is in conflict with another decision rendered by another Court of Appeals on the same matter, that is, District of Columbia v. Hunt, 163 F. 2d 833; in addition, the judgment here sought to be reviewed does not appear to be in accord with decisions of this court on the same matter, that is, the cases of McElroy, et al v. United States, 164 U.S. 76, 17 S. Ct. 31, 41 L. Ed. 355, and Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 355.

QUESTION PRESENTED FOR REVIEW

The case here sought to be reviewed was tried in the United States District Court for the Southern District of Florida, Miami Division, where it was known as:

8162-M-Cr.

United States of America

versus

Alberto L. Arango; Joa O. Antonio Fares, alias Joa Fares, alias Joe Fares; Carlos B. Fernandez; Gabriel Gomez; Mario Gomez; Samuel Gomez; Irma Henry Gomez, alias Irma Henry; Mario Martinez; Raul I. Martinez; Eugenio C. Ponce; Humberto Recio; John Sese and Domingo Zabalgogezcoa, alias Domingo Zabal.

The case here sought to be reviewed in said District Court together with two other cases which in the trial court were known as:

8227-M-Cr.

United States of America

versus

Alberto L. Arango; Raul I. Martinez and John Basmajian

8249-M-Cr.

United States of America

versus

Alberto L. Arango; Raul L. Martinez, Gabriel Gomez and John Edward Schultz.

Note: Petitioner, Gabriel Gomez, was dismissed from cause 8249-M-Cr. fourteen (14) months before trial.

The case here sought to be reviewed is one of conspiracy wherein the defendants, among them the petitioner, were charged as *teachers*, and one of them, Alberto L. Arango, as manager of the Berlitz Schools, having conspired to defraud the United States by claiming money from the United States for lessons in a foreign language taught students under what is commonly known as the G. I. Bill and which lessons in a foreign language were not actually taught to students by the defendant teachers.

The other two cases above mentioned (8227-M-Cr. and

8249-M-Cr.) which were consolidated by the trial court and tried together with the case here sought to be reviewed, were cases of conspiracy wherein the defendants were charged as *students*, and one of them, Alberto L. Arango, as manager of the Berlitz Schools, having conspired to defraud the United States by claiming money from the United States for having received lessons in a foreign language taught them by teachers of the Berlitz Schools under what is commonly known as the G. I. Bill and which lessons in a foreign language were not actually received by the defendant students.

The petitioner was not a defendant in either of said two last mentioned cases, the latter of said two cases (8249-M-Cr.) was dismissed as to the petitioner fourteen (14) months prior to the consolidated trial, (R-71-72).

The indictment in each of the three cases describes a different conspiracy occasioned during three different periods of time:

Case 7162 — from July 1, 1948 to April 1, 1951.

Case 8227 — from December 5, 1950 to February 15, 1951.

Case 8249 — from July 4, 1950 to February 15, 1951.

The petitioner objected in open court (R-112) to the consolidation of these three cases, which objection was overruled.

In the interests of clarity thoughout this brief, the petitioner will refer to the two cases last above mentioned

(8227-M-Cr. and 8249-M-Cr.) as *"the students' cases"* and to the case here sought to be reviewed as *"the teachers' case"* because the position is taken that the conspiracies in question are two separate and distinct conspiracies — the matter of consolidating the students' cases will not be mentioned in this brief, it being of no concern of the petitioner.

Note: Please see Supplemental Record for indictments in "the students' cases".

Thus the question here presented is:

Did the trial court err in consolidating for trial "the teachers' case", 8162-M-Cr. and the two "students' cases", 8227-M-Cr. and 8249-M-Cr.?

THIS CASE INVOLVES RULE 13 OF CRIMINAL PROCEDURE

Rule 13 of Criminal Procedure is verbatim as follows:

"The Court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information."

FACTS MATERIAL TO CONSIDERATION OF QUESTION PRESENTED

The petitioner contends that he was prejudiced at the trial in view of the consolidation for trial of "the teachers' case", No. 8162-M-Cr. and "the two students' cases No.

8227-M-Cr. and 8249-M-Cr., because only the defendant Arango was a defendant in all three cases while the petitioner (Gomez) was a defendant in only one case; moreover, each of the three cases charged different defendants (except for Arango), all of which offenses and all of which defendants could not have been joined in a single indictment.

In addition, neither the Government nor anyone else moved the court to consolidate the trial cases, 8162, 8227 and 8249; the Government's motion was to consolidate other cases, see Clerk's certification to this effect, (R-72-73).

The court did not enter a formal written order on the matter of consolidation of any of the cases in question but merely entered a verbal order in open court consolidating the cases here complained of; please see the recitation at the bottom of page 70 of the record and also R-112, at the latter point in the record, the petitioner objected in open court prior to the trial of "the teachers' case" 8162-M-Cr. to the consolidation of that case with the other two cases here complained of.

The court's attention is invited to the fact that the Government's motion to consolidate informations and indictments (R-72-73), which motion speaks of cases concerning persons who are also named in the various counts constituting the overt acts to the conspiracy in case 8162 here sought to be reviewed and the Government in this motion represented to the trial court that the defendants in the cases sought to be consolidated with the case here sought to be reviewed could all have been named in the same indictment; that all of the offenses charged were of

the same or similar character, and were based on the same acts or transactions constituting part of a common scheme or plan — therefore, those cases might have been consolidated by the trial court upon the representation made by the United States Attorney in the aforesaid motion but the cases that were actually consolidated for trial and actually tried together were not mentioned in the aforesaid motion and no representation by any attorney or officer of the court was made to the trial court suggesting that such consolidation was proper. Certainly the trial court is presumed not to know who could have been named in which indictment or whether the acts or transactions involved in any of the cases were of similar character or constituted part of a common scheme or that the same proof applied to all cases — otherwise the trial judge might be subject to disqualification for having knowledge and knowing of the facts of the case prior to the trial, therefore, it is submitted that the consolidation for trial complained of was without basis.

The appellate court, among other things, in its decision here sought to be reviewed, stated, on page 4 hereof, that the transcript of testimony containing the testimony of four witnesses who were called to testify in the students' cases were witnesses whose testimony would have been admissible in the trial which involved the petitioner, however, the appellate court did not pass upon the matter as to whether or not the testimony of these witnesses prejudiced the petitioner. It is contended here that not only the very consolidation of these cases prejudiced the petitioner but also the fact that witnesses who were testifying about other cases and mentioned the petitioner in connection with defendants who were being tried in other cases did, in fact, prejudice the petitioner because, if nothing else, this testi-

mony alluded "association" of the petitioner with defendants that four witnesses were brought to testify by the Government for the express purpose of showing the guilt of the student-defendants.

Note: Please see Supplemental Record containing testimony of the above mentioned four witnesses.

ARGUMENT OF REASONS RELIED ON FOR ALLOWANCE OF WRIT:

The writer has found many cases in his research touching on the matter of improper consolidation for trial, however, the most authoritative of these cases are only three, viz: McElroy, et al v. United States, 164 U. S. 76, 17 S. Ct. 31, 41 L. Ed. 355; District of Columbia v. Hunt, 163 F. 2d 833, and Kotteakos v. United States, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 355, which cases the writer will refer to as the McElroy case, the Hunt case and the Kotteakos case.

The McElroy case was one where six defendants were indicted for assault with intent to kill one Elizabeth Miller on April 16, 1894; they were also charged in another indictment for assault with intent to kill one Sherman Miller on the same day and they were further charged in still another indictment for arson of the dwelling house of one Eugene Miller on May 1, 1394. Three of the original six defendants were, in addition, indicted for the arson of the dwelling on one Bruce Miller on April 16, 1894. The trial court consolidated all four indictments for trial and each defendant objected.

The Supreme Court of the United States was here

faced with the question as to whether or not offenses claimed to have been committed by all defendants at one time could be joined with another and distinct offense committed by part of them at a different time. This proposition the Supreme Court of the United States resolved in the negative.

The court said:

"**** The record also discloses that there was no evidence offered tending to show that there had been or was a conspiracy between defendants, or them and other parties, to commit the alleged crimes.

The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and, in our opinion, they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves, and independent of each other, committed at different times, and not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenge in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise, that it is the settled rule in England and in many of our states to confine the indictment to one distinct offense, or restrict the evidence to one transaction. **** Necessarily, where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error.

It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And, even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence, and in no sense resulting from the same series of acts. **** While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same, and where the offenses are in no wise parts of the same transactions, and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion.

Judgment reversed as to all the defendants, and cause remanded, with directions to grant a new trial, and for further proceedings in conformity with this opinion."

The trial court in the case here sought to be reviewed consolidated the indictments in question claiming authority under Federal Rules of Criminal Procedure, Rule 13, which is as follows:

"The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The proceedure shall be the same as if the prosecution were under such single indictment or information."

The court's attention is invited to the Notes of Advisory Committee on Rules which appears in 18 USCA under Rule 13, at page 211, which states that Rule 13 is substantially a restatement of existing law, that is former Section 557 of 18 USCA, (Rev. Stat. 1878, Sec. 1024). This is mentioned as the McElroy case was decided on the old law which actually was substantially the same as our present Rule 13.

The Hunt case was one which originated in the District of Columbia where three defendants were charged with vagrancy alleged to have been committed on three separate dates. On motion of the prosecution, the cases were consolidated but all three objected to the consolidation.

The rule of procedure under which the consolidation was effected is Rule 5, Rules Regulating Practice before the Criminal Division of the Municipal Court for the District of Columbia, October 2, 1944, which is identical to Rule 13 of the Federal Rules of Criminal Procedure. The District of Columbia Rule reads as follows:

"(b) Trial Together of Informations: The Court may order two or more informations to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single information. The pro-

cedure shall be the same as if the prosecution were under such single information."

The United States Court of Appeals for the District of Columbia was faced with the proposition as to whether or not the consolidation of three informations, each against different defendants, each charging the same crime but occurring on three separate dates, was a proper consolidation. This proposition the court resolved in the negative. The court said:

"Under the plain words of the rule consolidation of two or more informations for trial is conditioned upon the possibility of joinder of the offenses and of the defendants in a single information; and such joinder is permitted only if the defendants are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.****

****The appellant urges that the question of consolidation is within the discretion of the trial judge and that no abuse is shown. This ignores the clear terms of the rule making consolidation of informations for trial dependent upon the possibility of joinder, and making joinder dependent upon allegations that the defendants separately charged participated in the "same act or transaction or in the same series of acts or transactions." If these conditions are fulfilled, there is a discretion, i.e., then the trial judge "may" consolidate the informations for trial, although he is not required to do so. But if, as an instant case, the acts or transactions in which the several defendants are alleged to have participated are not the same, then, the condition for joinder being unfulfilled, there is no discretion with respect to consolidation.****

****But erroneous denial of a separate trial cannot be classed as merely technical. The right not to be tried with another or others in whose cases the evidence would relate to a distinct, even though similar, act than that in which a defendant is alleged to have participated, is a substantial procedural right. It is a fundamental of our system of law that one person shall not be held criminally responsible for the independent act of another. And the fate, in a consolidated trial, of one defendant can hardly be unaffected by evidence relating to the acts of others.****"

The court's attention is again invited to the fact that in the case here sought to be reviewed, a conspiracy was consolidated with two other cases and all three consitute three different and separate conspiracies, each commencing on a separate date and not all terminating on the same date. It is perhaps true that each conspiracy constituted a scheme to fraudulently extract money from the Government — this is the only similarity between them but as for the personalities involved, they are not the same, nor were the times when the conspiracies were to have been in effect, nor was the modus operandi the same in that in one conspiracy, the teachers and the manager of a school, by their scheme, sought to defraud the Government during one period of time and each of the other two cases different groups of students conspired with the same manager of a school during two separate periods of time to defraud the Government.

The situation stated above seems parallel to the condition which existed in the Kotteakos case. The situation there was whether the petitioners (appellants) had suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government

proved not just one conspiracy but some eight or more different ones of the same sort executed through a common key figure, Simon Brown.

In the case here sought to be reviewed, the same situation existed and the "common key figure" was Alberto L. Arango, defendant in each of the cases consolidated for trial, he having been the manager of the school in question.

In the Kotteakos case, the court said:

"Here toleration went too far. We do not think that either Congress, when it enacted Sec. 269 or this court, when deciding the Berger case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the Berger situation and for others where proof may not accord with exact specifications in indictments. Otherwise criminal conspirators never could be brought to halt. But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Section 269 had no purpose to go so far. The line must be drawn somewhere. Whether or not Berger marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one.

In so ruling we are not unmindful, as the Court of Appeals has held more than once, that the problem is not merely one of variance between indictment and proof or of the right application of the policy of Sec. 269 for freedom of judgment, but is also essentially one of proper joinder under Sec. 557 of the Criminal Code. When we look at that section's requirement for separate statement in different counts of related but distinct "acts or transactions of the same class of crimes or defenses, which may be properly joined, instead of having several indictments, "our conclusion is reinforced."

CONCLUSION

This petition for writ of certiorari is therefore respectfully submitted to the Honorable Supreme Court of the United States for its consideration and the petitioner respectfuuly prays that said writ be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit be reviewed.

Respectfully submitted,

LOUIS A. SABATINO
Attorney for Petitioner
923 duPont Building
Miami 32, Florida

APPENDIX A

JUDGMENT.

Extract from the Minutes of June 24, 1957.

GABRIEL GOMEZ,

No. 16063 versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX B

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 16063

GABRIEL GOMEZ,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 24, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a conviction of appellant on several counts of an indictment charging a conspiracy to defraud and substantive acts of defrauding the United States by claiming money from the

United States for lessons in a foreign language taught students under what is commonly known as the G.I. Bill.

The principal basis for the appeal is the action of the trial court in consolidating for trial two other indictments involving other acts and other actors in addition to one central figure who was named in all three indictments.

There was ample evidence to support the Government's charge that at the Miami branch of a foreign language school there had been widespread participation by manager, assistant manager, teachers and students in a scheme to overstate to the Veterans Administration the actual number of hours of teaching and the numbers of students enrolled and numbers of hours of instruction received by individual students. The fruits of such a scheme were many fold. Managers of the school would receive compensation they were not entitled to, as well as kickbacks from teachers who participated in the fraud; the teachers would be paid for work not done and students would receive subsistence allowances they were not entitled to.

The particular indictment on which appellant was tried was based on his actions as a teacher in participating with the manager, Arango, and others in causing the false records to be prepared for submission to the Veterans Administration. The indictment charged many instances of naming certain students or fictitious students in whose names falsified attendance slips were made up.

The two other indictments, whose consolidation with the one naming Gomez is the principal basis of Gomez's appeal, each charged Arango and others (but not Gomez)

with conspiring with a certain named student to cause him to falsify his attendance records as a result of which the student was paid by the Government certain sums for subsistence which he was not entitled to receive.

Appellant strongly urges that it was prejudicial error for the trial court to consolidate for trial the three indictments, in two of which he was not named as a defendant. He says that the accumulation of evidence in the two cases in which he was not a defendant prejudiced his defense in the case in which he was responding because of the danger of identifying him with acts proven against the others.

The rule of procedure under which the trial court acted, and which the Government here contends supports its action, provides:

> "The court may order two or more indictments or information or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information." 18 U.S.C.A., Rule 13.

It thus becomes necessary for us to determine whether the charges against Arango and the students could have been included as counts of the indictment against Arango and the teachers.

In the nature of the indictment against appellant there were three groups involved; the school manage-

ment, the teachers and the students whose instruction was the thing actually paid for by the Government. Whenever a student claimed hours of instruction that he didn't receive this could be calculated to defraud the Government in two ways; first by padding the demand for tuition, and second by increasing the amount of subsistence. Clearly the connivances of the three groups would be helpful if not necessary for the successful operation of the scheme. The management could not safely claim excessive numbers of hours taught without cooperation of the teachers who certified to the false reports, and they could not safely make false reports of hours taught without cooperation of some of the students who were reported as the ultimate recipients of the fictitious periods of instruction.

Appellant has brought up to us the transcript of testimony of four witnesses who he says were called to testify in the cases of the student indictments. The caption shows that their testimony was in the case in which Gomez was on trial. However, assuming that they testified only in the other two trials that were consolidated with Gomez's trial, we find nothing in this testimony that would not have been admissible on the main trial. All four of the witnesses mentioned Gomez as a teacher or as being connected with the school. One of them testified that Gomez solicited the students' enrollment. All of their testimony related to the actual hours of instruction, and it was relevant to the Government's contention that the reports were padded.

We conclude that the charges against the students and management might well have been included in the indictment against the teachers and management.

Nothing in the Supreme Court's decision in *Kotteakos v. United States*, 328 U.S. 750, throws any light on our problem here. In the Kotteakos case the court held that whereas one conspiracy was charged involving many different acts, there were in fact eight different conspiracies. Here we say only that the charges of all three conspiracies could well have been included in a single indictment and the proof adduced as against the students could have been introduced against Gomez and his fellow conspirators on the teacher indictment if it had been tried separately. As was true in *United States v. Samuel Dunkel & Co., et al* (2 Cir.), 184 F. 2d 894, pursuant to the purpose alleged in the Gomez indictment different persons who participated in the conspiracy (here broken into three indictments) obtained and presented false claims to the Government. We think that, under the ruling of this Court in *Kivette v. United States* (5 Cir.), 230 F. 2d 749, the two indictments that were consolidated with the Gomez or "teacher" indictment could well have been made the basis of separate counts in the latter, and thus rule 13 is satisfied.

The only other basis for appeal asserted by appellant is that one of the jurors who heard the case was not a qualified juror under the Florida statutes. This is asserted to be so because the juror had lost his qualification as an elector and was not reinstated as an elector until after the trial started. Appellant cites no federal or Florida authority applicable to this situation. We think the contention is completely answered in *Ford v. United States* (5 Cir.), 201 F. 2d 300, where we said:

> ". . . . Where the objection to a juror relates, not to actual prejudice or other fundamental incompetence, but to a statutory disqualification only,

such disqualification is ordinarily waived by failure to assert it until after verdict, even though the facts which constitute the disqualification were not previously known to the defendants. The objection based upon the previous felony convictions comes too late after verdict, no actual bias or prejudice being shown. Spivey v. U.S., 5 Cir., 109 F. 2d 181, text 186; Strang v. U.S., 5 Cir., 53 F. 2d 820; Roush v. U.S., 5 Cir., 47 F. 2d 444; Bush v. U.S., 5 Cir., 16 F. 2d 709; Kohl v. Lehlback, 160 U.S. 293, text 302, 16 S. Ct. 304, 40 L.Ed. 432, tex 435; Raub v. Carpenter, 187 U.S. 159, 23 S.Ct. 72, 47 L.Ed. 119; Frazier v. U.S., 335 U.S. 497, tex 513, 69 S.Ct. 201, 93 L.Ed. 187, text 199; Morton v. Welch, 4 Cir., 162 F. 2d 840; Queenan v. Territory of Oklahoma, 190 U.S. 548, 23 S.Ct. 762, 47 L.Ed. 1175."

Concluding as we do that the trial court did not abuse his discretion in consolidating the three cases for trial and that there is no merit in the second ground of error relied upon, the judgment must be AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana

(SEAL)

I HEREBY CERTIFY that a true copy of the foregoing petition was air-mailed to the Solicitor General, Department of Justice, Washington 25, D. C., on the _____day of August, 1957.

LOUIS A. SABATINO

I HEREBY CERTIFY that a true copy of the foregoing petition was mailed to the office of the United States Attorney, Federal Building, Miami, Florida, on the _____day of August, 1957.

LOUIS A. SABATINO